his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

Mr. S. F. Leow for the plaintiffs submitted that the words "until the final determination of this suit" could be construed in a number of ways, that is to say, the suit could be withdrawn by the plaintiffs or may be struck out on the application of the defendants for some reason or other or be determined after a hearing. In the present case the plaintiffs, he said, had not taken any other proceeding in the action after receipt of defence and they were therefore entitled to discontinue the action under Order 26 rule 1 without leave of the court.

After giving due consideration to the submissions advanced on behalf of the parties I am inclined to agree with Mr. Leow. Mr. Edgar Joseph is I think quite right in his interpretation of the words "final determination" with reference to a hearing by a court of law but with respect I find myself unable to agree with him that the concluding phrase "until the final determination of this suit" in the order of court dated March 4, 1975 can have the effect of restricting the right of the plaintiffs to avail themselves of the clear provisions of Order 26 rule 1 which entitled them to discontinue their action against the defendants without leave of the court. The condition under which the plaintiffs could discontinue without leave of the court had been satisfied, namely, that after receipt of defence the plaintiffs had not taken any other proceeding in the action except for the interlocutory application of January 23, 1975 which in any event did not affect their right to discontinue without leave. Leave of the court is necessary only where a plaintiff after receipt of defence takes any other proceeding in the action save any interlocutory application. The case of *Fox* v. *Star Newspaper Company, supra* was on different ground. There the action for libel was ready for trial, the jury had been sworn and the pleadings had opened and it was only then that the plaintiff sought to be nonsuited. The parties in the present case were a good distance apart, the action had no where reached the stage at which they were meeting face to face and if at a certain stage the rules provided for the discontinuance of their action which they considered not worth their while to contest the plaintiffs were perfectly entitled to take advantage of those rules.

In the circumstances therefore I hold that the plaintiffs' discontinuance of their action against the defendants without leave of the court is not in breach of Order 26 rule 1 of the Rules of the Supreme Court. In the light of this decision on the first prayer in the application I find it unnecessary to decide on the second prayer seeking leave to file a counterclaim. The application is dismissed with costs.

Application dismissed.

Solicitors: *Gunaretnam & Co.; Shearn, Delamore & Co.*

CHOO KIM SAN v. MALAYSIA BORNEO FINANCE CORPN. (M) BHD. & ANOR.

[O.C.J. (Mohamed Azmi J.) April 29, 1975]
[Kuala Lumpur — Civil Suit No. 931 of 1974]

Practice and Procedure — Affidavit — Cross-examination of deponent — R.S.C., 1957, O.38 r.1.

In this case the question arose as to the proper procedure to be adopted for requiring a deponent to be cross-examined under O.38 r.1. It was contended on a preliminary point that the procedures of serving a notice of intention to cross-examine deponent and making oral application to the court for that purpose as adopted by the second defendant in this case was not proper.

Held: the necessity for a summons for leave to cross-examine on affidavits and for an order to produce a deponent only applies to trial by affidavits. In other cases the order for attendance of a deponent for cross-examination can be granted by the court on oral application of any part after notice of intention to cross-examine deponent has been served.

CIVIL SUIT.

Raja Abdul Aziz bin Raja Addruse (*R. R. Sethu* with him) for the plaintiff.

Ng Chen Kiat for the first defendant.

Kok Wee Kiat for the second defendant.

Mohamed Azmi J.: This is an application by the plaintiff by Summons-in-Chambers dated September, 2, 1974 for liberty to sign final judgment against the defendants. In support of the application, the plaintiff filed two affidavits whilst his solicitor affirmed one affidavit. The application is opposed by the defendants vide affidavits affirmed by Huang Heng Chuen, General Manager of the first defendant; Yap Ping Kon, Secretary of the second defendant, and Raja Azam, the former Chairman of the second defendant. Notice of Intention to cross-examine two of the deponents, *viz.* the plaintiff and Raja Azam, were issued by the second defendant and served on the respective deponents or their solicitors.

In the other Summons-in-Chambers dated October 10, 1974, the second defendant applies to set aside the plaintiff's action on the ground that the address of the plaintiff indorsed in the Specially Indorsed Writ is illusory or fictitious; or, alternatively, for the plaintiff to give security for the second defendant's costs of the action.

When both applications came before me, counsel for the second defendant applied under Order 38 rule 1 of the Rules of the Supreme Court to cross-examine the plaintiff in respect of the second defendant's application. Although Notice of Intention to cross-examine the plaintiff has been issued and served on the deponent in respect of the plaintiff's application, no such Notice has been served in respect of the second defendant's application.

In this case, learned counsel for the plaintiff has raised a preliminary point in respect of the proper procedure to be adopted for requiring a deponent to be cross-examined under Order 38 rule 1. It is his contention that the procedure of serving Notice of Intention to cross-examine deponent and making oral application to court for that purpose as adopted by the second defendant in the present case is not proper. Whilst admitting that our Rules of Supreme Court do not provide any particular procedure, he contends that for the purpose of requiring attendance of a deponent for the purpose of cross-examination, an application

must be made in the form of a summons as prescribed in the old edition of *Atkin's* Court Forms and Precedents, Volume 5, at page 272. He further states that the present procedure is probably based on the old Civil Procedure Code, and therefore should not be adopted.

Order 38 rule 1 provides:

"Upon any motion, petition, or summons evidence may be given by affidavit, but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

In this case, it is not in dispute that our Order 38 contains only twenty-four rules, whereas the equivalent English provision has rules 25 to 31. It is also not in dispute that those rules which do not appear in our Order 38 deal with trial by affidavit. Having read the *Atkin's* Court Forms at page 272, I am of the view that the summons for leave to cross-examine on affidavits and for an order to produce a deponent which learned counsel for the second defendant has suggested for adoption, only applies to trial by affidavits; and, as such, I do not think such procedure should be adopted in the present case. Having regard to the provision of Order 38 rule 1, I am of the view that the order for the attendance of a deponent for cross-examination can be granted by the court on oral application of any party to the proceedings after Notice of Intention to cross-examine deponent has been served. Although based on the requirement of sections 534 to 540 of the repealed Civil Procedure Code 1907, the present procedure adopted in the High Court is both sound and convenient in the absence of any specific provision. The notice will serve to forewarn a deponent that he is required to attend court, and this procedure will avoid a party from being taken by surprise if no notice at all was given. As stated in the foot-note of *Atkin's* Court Forms and Precedents at page 272:

"Cross-examination on affidavit may take place (a) before trial, or (b) at the hearing of a trial on which evidence is taken on affidavit by consent, or (c) after trial. In case (a) the court's jurisdiction is regulated by Order 38, r.1, but by Order 37, r.22, the practice on cross-examination at a trial is extended to the case *(Mansel* v. *Clanricarde, infra)*; case (b) is regulated by Order 38, rr.28, 29, and the above form is not intended for use in such a case; in case (c) the court's jurisdiction is regulated by Order 38, r.1, but by Order 37, r.21, evidence is to be taken in the same manner as evidence taken at or with a view to trial, and the above form may be used in such a case."

In my judgment, the present proceedings do not come under case (a), (b) or (c). I do not agree with the submission that the present case comes under (b). Even if it does, from the foot-note commentary as quoted above, the summons as prescribed in Form 137 of *Atkin* is not intended for use in such case. In the circumstances, I hold that the present procedure of serving notice of intention to cross-examine deponent and making oral application is sufficient compliance with Order 38 rule 1 of the Rules of the Supreme Court where cross-examination of a deponent is required at the hearing of a trial of the present nature.

Order accordingly.

Solicitors: *Rithauddeen & Aziz; Chin, Sethu & Co.; Wong & Cheng Kiat; Mah-Kok & Din.*

YAP CHENG KEE & ANOR. v. OW GIAM ENG & ANOR.

[A.C.J. (Wan Suleiman F.J.) May 19, 1975]
[Seremban — Civil Appeal No. 6 of 1971]

Landlord and Tenant — Statutory tenant — Death of statutory tenant — Whether family of statutory tenant entitled to remain on the premises — Control of Rent Ordinance, 1956, ss. 2(1) and 12(1)(i).

The respondent's predecessor in title had instituted ejectment proceedings against the tenant of the premises. The application had been dismissed and it was claimed that the tenant became a statutory tenant. The tenant subsequently died and the respondents thereupon served a notice to quit on the appellants, the administrators of the estate of the deceased tenant, and brought an action for recovery of possession. The learned magistrate gave judgment for the respondents. The appellants appealed. On August 20, 1974 Wan Suleiman F.J. delivered judgment dismissing the appeal (see [1975] 1 M.L.J. 151). Subsequently the learned judge revised his judgment.

Held, allowing the appeal: section 2(1) of the Control of Rent Ordinance, 1956, has extended the meaning of "tenant" thus enlarging the scope of the protection of the Ordinance and the family of the deceased statutory tenant was therefore protected by the Ordinance.

Cases referred to:-

(1) *Ayyar* v. *Parameswara Iyer* [1953] M.L.J. 102, 103.
(2) *Che Esah & Anor.* v. *Che Limah* [1966] 1 M.L.J. 36.
(3) *State of Perak* v. *P.R.A.L.M.M. Muthukaruppan Chettiar* [1938] M.L.J. 247, 256.
(4) *Tan Khio Soei & Anor.* v. *Ban Hin Lee Bank Ltd.* [1964] M.L.J. 71.
(5) *Ramasamy Pillai* v. *Meyappa Chettiar* [1955] M.L.J. 105, 106.
(6) *Keeves* v. *Dean* [1924] 1 K.B. 685.
(7) *Thong Seong Poh & Anor.* v. *Thong Meng Tee* [1967] 1 M.L.J. 23; [1967] 2 M.L.J. 153.

CIVIL APPEAL.

Khaw Yew Mei (Miss) for the appellants.

Atma Singh Gill for the respondents.

Wan Suleiman F.J.: The respondents in this appeal, the plaintiffs in the court below, are the registered proprietors of premises No. 11, Main Road, Bahau, and the appellants, who were the defendants in that action, are the administrator of the Estate of Yap Boot alias Yap Eng Kee (hereinafter to be referred to as the deceased), in which capacity they were sued.

The respondents' predecessor in title had let the premises to the deceased on certain financial terms not material for the purposes of this appeal.

On November 29, 1947 respondents' predecessor in title instituted ejectment proceedings against the deceased (see Exhibit "A") and on December 19, 1947 the application was dismissed. The respondents therefore claim that deceased thereby became a statutory tenant.

Deceased died intestate on July 22, 1966 and appellants extracted Grant of Letters of Administration on July 3, 1967.

Respondents then served upon the appellants a notice to quit dated February 2, 1968 purporting to terminate the tenancy on March 31, 1968, and prayed *inter alia* for vacant possession of the premises.

The statement of defence was not as precise as it should be, but at the trial counsel for both parties elected not to call witnesses but to make submissions of law on the pleadings.

Because of the lack of precision in the pleadings, particularly in the statement of defence, and because of